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2 Telephone Conference, on the Record  
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1 P R O C E E D I N G S

2 THE COURT: All right, we're here in Residential  
3 Capital, number 12-12020. This is in connection with  
4 discovery -- a discovery dispute in the Minnesota case,  
5 regarding enforcement of subpoena here. This is a matter --  
6 two matters, now, have been referred to this Court by the  
7 district court.

8 Could I have the appearances, please, for the moving  
9 party?

10 MR. RUSSELL: Yes, this is William Russell, and with  
11 me is David Gallo. We're with Simpson Thacher & Bartlett, LLP.  
12 We're appearing on behalf of defendants-movants, MortgageIT  
13 Inc. and DB Structured Products, Inc.

14 THE COURT: Okay.

15 MR. JOHNSON: Good morning, Judge Glenn. This is Matt  
16 Johnson of Williams & Connolly on behalf of HSBC Mortgage in  
17 the adversary proceedings before Your Honor and on behalf of  
18 Decision One Mortgage and Home Loan Center in the District of  
19 Minnesota cases. Like last week, with respect to the MBIA  
20 motion to compel, which was discussed with Your Honor on a  
21 call, I believe, last Wednesday, I'm largely here in a support  
22 role and to provide any resources if there are any SDNY case-  
23 specific issues that happen to come up on the call. But Mr.  
24 Russell and Mr. Gallo of Simpson Thacher will be handling the  
25 substantive portion of the argument.

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1 THE COURT: All right. Anybody else on the phone?

2 Who's on behalf of Ally?

3 MR. PARISH: Good morning, Your Honor. Jason Parish  
4 from Kirkland & Ellis for Ally Financial.

5 MR. ALDEN: Good morning, Your Honor. Anthony Alden  
6 from Quinn Emanuel for the ResCap Liquidating Trust and RFC.

7 THE COURT: Okay. Are the issues on this dispute the  
8 same as the ones with respect to MBIA, Mr. Russell?

9 MR. RUSSELL: Your Honor, I think they are. I'm not  
10 as familiar with the MBIA issues. I know there are a  
11 similarity in the sense that it is defendants in the RFC cases  
12 in Minnesota seeking discovery from a third party. I think the  
13 issues are somewhat different because Ally and MBIA are  
14 different parties and play different roles in the underlying  
15 facts.

16 THE COURT: Let me ask you, though, are you seeking  
17 production of Ally's materials, whatever it's submitted to the  
18 examiner? Is that what this is about?

19 MR. RUSSELL: We are -- in addition to other  
20 categories of documents relating to the bankruptcy settlement,  
21 Your Honor.

22 THE COURT: Well, I --

23 MR. RUSSELL: I'm not -- I'm sorry.

24 THE COURT: Have you met and conferred with Ally's  
25 counsel? Tell me what the disputes are.

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1 MR. RUSSELL: Yes, we've met and conferred with Ally's  
2 counsel throughout last spring and this fall. We've narrowed  
3 our request to five categories of documents; and to date,  
4 they're refused to produce any documents.

5 THE COURT: What are the five categories?

6 MR. RUSSELL: The first category is documents and  
7 communications to or from Ally's risk officer or other  
8 individual charged with responsibility for accepting risk for  
9 RFC, including documents concerning Ally's assessment of RFC's  
10 liability or potential liability.

11 The second category is documents and communications  
12 concerning pre-mediation discussions between Ally and any  
13 debtors or creditors, concerning settlements of RMBS claims,  
14 excluding documents that are subject to your August 28th 2015  
15 order, as being subject to the previous mediation order.

16 And this includes documents concerning Ally's third-  
17 party release provided in connection with any RMBS settlements  
18 or the global bankruptcy settlement.

19 The third category is documents and communications  
20 concerning Ally's contribution to the bankruptcy settlement,  
21 and any intercompany balances among Ally and the debtors that  
22 may have been canceled or offset as part of the bankruptcy  
23 settlement.

24 The fourth category is documents and communications  
25 produced by Ally to the examiner.

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1                   And the last and fifth category is documents and  
2 communications concerning the negotiation or drafting of the  
3 plan support agreement..

4                   THE COURT: Say that one again? I can't hear you.

5                   MR. RUSSELL: I'm sorry, Your Honor. The fifth  
6 category is documents and communications concerning negotiation  
7 or drafting of the plan support agreement.

8                   THE COURT: All right, Mr. Parish, do you want to  
9 respond?

10                  MR. PARISH: Yes, Your Honor. I want to start with  
11 sort of the procedural context of the events sort of leading up  
12 to us being before you today.

13                  Defendant served a subpoena on May 11th of last year.  
14 The subpoena contained seventeen very broad categories for  
15 documents, much broader than the five requests that Mr. Russell  
16 just walked through.

17                  After Ally served its objections to the subpoena, the  
18 defendants and Ally had three meet-and-confer calls in June,  
19 July, and October. On each of those calls, Ally sort of set  
20 out its objections, including that the requests were very  
21 broad; and the message that Ally gave to the defendants on each  
22 of those calls was essentially tell us what you're looking for;  
23 tell us what you need specifically from Ally that you can't get  
24 from the plaintiffs or other third parties that you've already  
25 sought documents from.

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1                   So after that third call on October 16th, defendants  
2 finally agreed to narrow the subpoena to the five categories of  
3 documents Mr. Russell walked through. Ally responded with a  
4 letter one week later, noting issues with three of those  
5 requests; but that letter and subsequent communications  
6 contemplated that the parties would have further discussions.

7                   However, those discussions never really occurred.

8 Defendants, at that time, terminated the meet-and-confer, and  
9 three months later, in January, filed a motion.

10                  So I can respond to each of the specific requests, but  
11 the sort of meet-and-confer process that I think is  
12 contemplated in any sort of discovery situation, in our view,  
13 it hasn't really happened here. Defendants haven't given us  
14 their explanation of what specifically they need from Ally with  
15 regard to these five categories of documents, which are still  
16 quite broad. And from Ally's reading and understanding of the  
17 indemnification litigation, these documents, in many instances,  
18 aren't relevant to the issues in the case.

19                  THE COURT: All right, just bear with me, everybody, a  
20 second.

21                  (Pause)

22                  THE COURT: Mr. Parish, is it correct, the subpoena  
23 was issued in connection with the litigation pending in  
24 Minnesota before Judge Nelson?

25                  MR. PARISH: I believe so, Your Honor.

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1 THE COURT: Mr. Russell, why shouldn't -- with the  
2 exception, perhaps of the issue of the documents produced to  
3 the examiner, why shouldn't Judge Nelson decide whether to  
4 require discovery as to the other four categories?

5 I except out the examiner issue, because the examiner  
6 was appointed by this Court and conducted his investigation  
7 pursuant to order of the Court. But why shouldn't Judge Nelson  
8 decide the remaining issues?

9 MR. RUSSELL: Your Honor, the subpoena was issued out  
10 of the Southern District of New York. So because the subpoena  
11 had been issued here, we moved to compel here. And then given  
12 that we filed the motion in the district court, given your  
13 familiarity with the case, it was, I believe at Ally's request,  
14 referred to the bankruptcy court and assigned to you.

15 The short answer is, because the subpoena was issued  
16 out of the Southern District.

17 Your Honor, one point of clarification. Mr. Gallo  
18 corrected me. I guess the subpoena was technically issued out  
19 of the Minnesota court, but the place, the performance was in  
20 New York --

21 THE COURT: Right.

22 MR. RUSSELL: -- removed to here.

23 THE COURT: Mr. Parish, why shouldn't Judge Nelson  
24 decide the issue as to the four categories other than  
25 production of documents to the examiner?

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1 MR. PARISH: Your Honor, I don't know that he (sic)  
2 shouldn't, but there --

3 THE COURT: It's a she. It's a she.

4 MR. PARISH: I'm sorry; apologies. I think it makes  
5 sense, just from an efficiency standpoint, to have all of the  
6 requests decided together.

7 THE COURT: Well, I don't think I ought to be sitting  
8 and deciding discovery issues in the cases pending in  
9 Minnesota. And I think the issue with respect -- I separate  
10 out the issue of material produced to the examiner, because it  
11 was pursuant to this Court's order that the examiner was  
12 appointed and conducted his investigation, et cetera. But as  
13 to the other four categories, I don't see why I should be the  
14 one to do that.

15 Mr. Russell, do you consent to transferring this  
16 matter to Judge Nelson for her decision?

17 MR. RUSSELL: We do. While we would be happy to have  
18 Your Honor decide it, if Your Honor believes it's more  
19 appropriate for Judge Nelson to do so, we have no objection.

20 THE COURT: Mr. Parish, do you consent to transferring  
21 this matter to Judge Nelson for her decision? And I say "her  
22 decision", except for the issue of documents produced to the  
23 examiner, which is before me in the MBIA matter, and does  
24 relate more closely to the bankruptcy.

25 MR. PARISH: Yes, Your Honor, we would consent to

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1 that.

2 THE COURT: Mr. Johnson, do you want to be heard?

3 MR. JOHNSON: No, Your Honor. I think that's  
4 sufficient.

5 THE COURT: Well, what I would like to do --

6 MR. ALDEN: Your Honor, could I make one comment?

7 THE COURT: Who's that?

8 MR. ALDEN: This is Anthony Alden for the Trust.

9 THE COURT: Yes, go ahead.

10 MR. ALDEN: Just, Your Honor, I guess, two questions.  
11 One is, I think, although I recognize that no one from MBIA is  
12 on this call, I think it presents the same issues in that I  
13 think there were two categories, one related to the bankruptcy  
14 examiner and one unrelated to the bankruptcy examiner  
15 submissions.

16 THE COURT: I read all the briefs that were filed in  
17 the MBIA, and the only -- in connection with the MBIA dispute,  
18 and all I saw was arguments about information produced to the  
19 examiner or relating to communications with the examiner. What  
20 specifically -- I may have missed something?

21 MR. ALDEN: I believe that the defendants -- certain  
22 defendants in the District of Minnesota cases are also seeking  
23 custodial productions outside -- unrelated to the bankruptcy  
24 examiner submissions. I'm --

25 THE COURT: You want to point me to something in the

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1 briefs? I've got the pile of briefs sitting in front of me.  
2 I've read them all.

3 MR. ALDEN: Yeah, I can try and pull them up, Your  
4 Honor.

5 (Pause)

6 MR. ALDEN: Sorry, Your Honor. I'm just looking at  
7 the briefing.

8 Your Honor, I'm just looking at the briefing. But if  
9 one looks at the MBIA -- the defendants' opening brief --

10 THE COURT: I have it here. Tell me where to look.

11 MR. ALDEN: I'm looking at the opening brief, page 4,  
12 Your Honor.

13 THE COURT: Let me -- hang on.

14 MR. ALDEN: Under subjection (b), MBIA refused to  
15 respond fully to defendants' Rule 45 subpoena. The subpoena  
16 sought discovery concerning four subjects: the global  
17 settlement, MBIA's broad claims against RFC, the liquidating  
18 trust, and plaintiffs' actual or potential causes of action.

19 THE COURT: Yeah, but when it goes on, and then when I  
20 read MBIA's brief, as to those issues remaining in dispute, it  
21 appeared to me, the only thing remaining in dispute focused on  
22 the production of stuff to the examiner.

23 I mean, MBIA seems to have -- the parties  
24 substantially seem to have agreed the dispute is about whether  
25 materials produced to the examiner are required to be produced.

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1 And certainly the plaintiff filed its brief and argued why that  
2 shouldn't be produced.

3 I understand the opening motion in the district court;  
4 but there was a lot of movement when I had a hearing on this  
5 matter. When I say "a lot of movement", I think that the area  
6 of dispute was substantially narrowed and focused on the issue  
7 of production of anything given to the examiner.

8 MR. ALDEN: Your Honor, I'm --

9 THE COURT: That's enough. I don't want to hear any  
10 more.

11 MR. ALDEN: -- I stand corrected. You're not  
12 representing a party in this dispute, so --

13 MR. ALDEN: Correct. And I may be wrong, Your Honor.  
14 I was under the --

15 THE COURT: Stop. Stop.

16 All right. With respect to the issue -- and let me  
17 tell you what I'm going to do. I'm going to call Judge Nelson  
18 and find out what her position is with respect to the pending  
19 motions. When I say "the pending motions", one with respect  
20 to -- and I don't have briefs; I have the letter from Simpson  
21 Thacher.

22 Did you actually file a brief in the district court,  
23 Mr. Russell?

24 MR. RUSSELL: We did, Your Honor.

25 THE COURT: Okay.

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1 MR. RUSSELL: We did.

2 THE COURT: All right. But I want to -- some of you  
3 on the phone know this, some of you may not -- is that  
4 periodically Judge Nelson and I confer because we're trying to  
5 coordinate the cases pending before me and the much larger  
6 number of cases pending before her. And I will -- I'm not  
7 going to unilaterally simply order that the other issues be  
8 transferred to her, since there are no briefs filed yet with  
9 respect to the DB Structured Products v. Ally Financial  
10 dispute.

11 MR. RUSSELL: Your Honor, it is actually fully  
12 briefed. We filed our papers in support of the motion. Ally  
13 filed an opposition brief and affidavit, and we submitted and  
14 filed a reply brief, Your Honor.

15 THE COURT: That's in the district court?

16 MR. RUSSELL: Yes. Yes, Your Honor.

17 THE COURT: All right. And did Ally -- did you file a  
18 brief as well, Mr. Parish?

19 MR. PARISH: Yes, Your Honor. We filed an opposition  
20 brief, I think, in late December.

21 THE COURT: Okay. I don't have any of those papers.  
22 Really, all I had was the letter from Mr. Russell requesting  
23 this conference.

24 MR. ALDEN: Your Honor, I would just say that the  
25 Trust would file something substantially similar to what it

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1 filed in MBIA --

2 THE COURT: Okay.

3 MR. ALDEN: -- concerning the examiner submissions.

4 THE COURT: Well, if you're going to file something  
5 substantially -- well, to the extent it relates to the examiner  
6 issue -- well, here's what I'm going to do.

7 Mr. Russell, have delivered to chambers a full set of  
8 the briefs that were filed in the district court.

9 MR. RUSSELL: Yes, sir, Your Honor.

10 THE COURT: Everybody's briefs.

11 MR. RUSSELL: Yes, sir.

12 THE COURT: I will try and reach Judge Nelson today.  
13 I don't know whether I'll be able to or not. I'll follow up  
14 next week if I'm not able to speak with her today. And it may  
15 be that with respect to the discovery disputes in the cases  
16 pending before her, other than the examiner issue, that if  
17 she's willing to take it, I may well send it to her. But I'll  
18 enter an order if I do that.

19 The parties to that dispute, Mr. Russell -- the  
20 counsel for the parties to the dispute, Mr. Russell and Mr.  
21 Parish, during the call today -- and this is on the record --  
22 have both consented to having the matter transferred to Judge  
23 Nelson for her to decide. But I will speak with Judge Nelson  
24 and see what she has to say about it.

25 With respect to the Trust's counsel, if you wish to

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1 file -- let me ask you now. Do you want to file a brief on the  
2 examiner issue, or are you satisfied to rest on the brief you  
3 filed in connection with the MBIA dispute?

4 MR. ALDEN: I think we would like to file a brief,  
5 Your Honor.

6 THE COURT: Okay. I will give you until next Thursday  
7 at 9 a.m. to file a brief. I can't believe it's going to be  
8 very different from what you've already filed, but I'll  
9 certainly allow you to do that.

10 MR. ALDEN: Thank you, Your Honor.

11 MR. RUSSELL: Your Honor, this is William Russell.  
12 Will we have an opportunity to respond?

13 THE COURT: No, you've got your -- you said you've  
14 already briefed everything in the district court. I think --  
15 look, these issues -- I understand these issues.

16 MR. RUSSELL: Your Honor, we did not brief the issues  
17 that I expect Mr. Alden will raise, but we don't want to burden  
18 the Court with excess paper. And my understanding from  
19 speaking to Mr. Johnson and others is that the examiner issue  
20 was fully discussed at a conference with respect to the MBIA  
21 motion. So if Your Honor would prefer that we not submit  
22 papers, we understand.

23 THE COURT: Well, my preference is that you not, but  
24 I'm not saying you can't. So if I'm giving Ally until  
25 Wednesday at 9 a.m., I'll give you till Friday at 5 p.m., so

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1 you'll have their brief. I mean, I -- get the brief from Mr.  
2 Johnson as to what's already been submitted. I've got a pile  
3 of briefs sitting in front of me.

4 MR. RUSSELL: Thank you, Your Honor. And it may be  
5 that we rely on Mr. Johnson's brief --

6 THE COURT: Okay.

7 MR. RUSSELL: -- but we appreciate it, Your Honor.  
8 Thank you.

9 THE COURT: All right. There's a -- there are  
10 potentially some issues that are not addressed in the briefs  
11 that were filed in front of me in the MBIA dispute. And I've  
12 done some independent research about it; haven't reached any  
13 conclusions. But that issue is whether information produced  
14 either in internal corporate investigations or SEC or CFTC  
15 investigations are discoverable, and specifically with respect  
16 to nonprivileged material, although there may be an issue of  
17 waiver before material is produced.

18 And there is a long line of cases that I've found  
19 with -- and I think I raised this issue during a hearing on the  
20 MBIA dispute. But let me just say, in looking at the briefs on  
21 the MBIA dispute, I don't see anyone citing any authority,  
22 federal authority, that establishes the existence of a  
23 privilege for information submitted in an examiner's  
24 investigation or an internal investigation, even if there was  
25 a -- I'll call it -- a private confidentiality agreement;

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1 because this Court never entered a confidentiality order with  
2 respect to material produced to the examiner. And none of the  
3 briefs I have so far address any of those issues.

4 MR. PARISH: Your Honor, It's Mr. Parish for Ally.  
5 Our opposition brief to the motion to compel did not focus  
6 specifically on the confidentiality or privilege issues  
7 involving productions to the examiner. If I could propose,  
8 maybe we could submit a short brief that sort of fleshes out  
9 that issue, whether there is a privilege that applies to  
10 examiner submissions. And frankly, I don't know the answer to  
11 that, as I sit here right now. And we could do it, perhaps, on  
12 the time frame that you just set out for the plaintiffs'  
13 motion, which I think you set it by next Thursday at 9 a.m.

14 THE COURT: I think it was Wednesday at 9 a.m.

15 MR. PARISH: Wednesday, 9 a.m.?

16 THE COURT: Okay, yeah, I'm going to -- if I was  
17 inconsistent, Wednesday at 9 a.m. is the first set, and then I  
18 give Ally until Friday at 5 p.m. I want to get this -- I want  
19 to get these issues resolved. I want to see anything that's  
20 going to go to Judge Nelson. I want to get her okay to that.

21 But with respect to the issues of the examiner, again,  
22 because the examiner was appointed in my case pursuant to my  
23 order, I'll go ahead -- I will discuss, not the merits of it,  
24 but the issue of whether she -- if she thinks she ought to  
25 decide it in this case, rather than me, I'll certainly consider

1 that. But it does seem to me, just as I decided the mediation  
2 privilege issue, I think addressing production of materials to  
3 the examiner, I ought to address.

4 The other thing, counsel for Ally, I don't know  
5 whether you've read MBIA's filing or not. I asked that they  
6 address, which they did, the issue of cost shifting. Ally is  
7 not a defendant in the Minnesota cases. Am I correct in that?

8 MR. PARISH: That's correct, Your Honor.

9 THE COURT: Yeah. And MBIA extensively dealt with the  
10 issue -- I said during a hearing that I certainly thought I had  
11 the power to shift the costs of preparing -- for example  
12 preparing a privilege log or other potential costs. And I  
13 asked that that be briefed; and MBIA did that.

14 If Ally wants to include that in its brief, you  
15 should, as well.

16 MR. PARISH: We will do that, Your Honor.

17 THE COURT: All right. Anything else for today?

18 UNIDENTIFIED SPEAKER: No, Your Honor -- I'm sorry.

19 MR. JOHNSON: Your Honor, just -- Your Honor, this is  
20 Matt Johnson. I just want to make sure there's no confusion on  
21 the briefing, because I believe Your Honor said Ally at 5 p.m.  
22 on Friday. What I'm understanding is that the Trust and Ally  
23 should submit anything they intend to submit by Wednesday at 9,  
24 and that movants-defendants, should submit anything they want  
25 to submit in response by Friday at 5 p.m.

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1 THE COURT: Thank you -- Mr. Johnson, thank you for  
2 that gentle correction, because you're absolutely correct.

3 Okay, does everybody understand that, that it's got to  
4 be in that order? Everybody understand that? Thank you, Mr.  
5 Johnson. I misspoke.

6 MR. ALDEN: Your Honor, this is Anthony Alden for the  
7 Trust. One final thing is the MBIA -- hearing in MBIA is  
8 currently scheduled for April 7th.

9 THE COURT: Actually, you're not coming through  
10 clearly. If you're on speakerphone, pick up the phone.

11 MR. ALDEN: Your Honor, the MBIA hearing is currently  
12 scheduled for April 7th. I believe that's next Thursday, if  
13 I'm not mistaken. If Your Honor is going to hear the disputes  
14 in both cases, at least as to the examiner submission, it would  
15 make sense, in the interest of efficiency to hear them at the  
16 same time as opposed to two separate hearings, basically,  
17 potentially on the same issue.

18 THE COURT: I think that's correct. I'll have to look  
19 at the calendar. My courtroom deputy is out today, but I'll  
20 probably move that April 7th hearing date.

21 MR. ALDEN: Okay. Thank you, Your Honor.

22 THE COURT: To the extent there are common issues, I  
23 want to hear and decide them at the same time.

24 All right, anything else anybody wants to raise today?

25 IN UNISON: No, Your Honor.

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1 THE COURT: All right. Thanks very much. We're  
2 adjourned.

3 IN UNISON: Thank you, Your Honor.

4 (Whereupon these proceedings were concluded at 11:32 AM)

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2 C E R T I F I C A T I O N

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4 I, Penina Wolicki, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

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*Penina Wolicki*

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Date: April 4, 2016

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